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## Capital Punishment and Contingency

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## BOOK REVIEW

### CAPITAL PUNISHMENT AND CONTINGENCY

PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION. By David Garland. Cambridge, Mass.: The Belknap Press of Harvard University Press. 2010. Pp. 393. \$35.00.

*Reviewed by Carol S. Steiker\**

In the past decade, a burgeoning literature has sought to address the growing divide between the United States and other Western liberal democracies with regard to criminal punishment practices. Although all of these countries, the United States included, have experienced many of the same problems over the past forty years — such as steep crime rate increases, a sophisticated international drug trade, and growing threats from terrorism — the United States has seen nothing short of a revolution in its punishment practices since the 1960s, a stunning shift unprecedented in its own history and unique among its contemporaries. American imprisonment rates have soared, increasing fivefold between 1972 and 2007,<sup>1</sup> reflecting and accompanying other punitive criminal justice policies such as “zero tolerance” policing initiatives, expansions of the scope of the substantive criminal law, “three strikes” statutes enhancing punishment for recidivists, increased use of criminal sanctions for juvenile offenders, widespread authorization of sentences of life without possibility of parole — and, of course, increased use of the death penalty.<sup>2</sup>

A diverse group of scholars, including historians, sociologists, and legal scholars, has offered various explanations for these radical changes — some complementary, some contradictory. Professor David Garland was an early and influential participant in this scholarly dis-

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\* Henry J. Friendly Professor of Law, Harvard Law School. For helpful and engaging discussions, I thank the participants in the Radcliffe exploratory seminar Comparative Perspectives on the Death Penalty, held at the Radcliffe Institute for Advanced Study at Harvard University on May 20–21, 2011, and especially my seminar cohort, Moshik Temkin of the Harvard Kennedy School.

<sup>1</sup> Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010).

<sup>2</sup> See David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 LAW & SOC. INQUIRY 295, 331 (2008) (finding that “a country’s death penalty status is linked to its general punitiveness toward criminals”). See generally JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

cussion with his generative book *The Culture of Control*,<sup>3</sup> in which he described the recent trends in crime policy and social attitudes toward crime in both the United States and Britain as the product of “two underlying social forces — the distinctive social organization of late modernity, and the free market, socially conservative politics that came to dominate the USA and the UK in the 1980s.”<sup>4</sup> Now Garland has turned his attention to a crime policy issue that divides the United States from Britain and the rest of the Western industrialized world — the continued retention and use of capital punishment, which accelerated in the United States from the 1970s to the 1990s, the same period in which Europe embraced abolition.

In *Peculiar Institution: America's Death Penalty in an Age of Abolition*, Garland addresses three ways in which the American death penalty is “peculiar.” First, he tackles directly the question of peculiarity in the sense of distinctiveness, seeking to understand why many jurisdictions within the United States “continue to use capital punishment at a time when all other Western nations have decisively abandoned it” (p. 11). Second, Garland seeks to understand the peculiarity of the manner in which the death penalty is maintained in many American jurisdictions, which reflects “an extreme form of institutional ambivalence, expressed in a uniquely cumbersome and conflicted set of arrangements” (p. 11), making the punishment “poorly adapted to the stated purposes of criminal justice” (p. 13). Finally, Garland connects the peculiarity of the American death penalty to the original American “peculiar institution” — slavery — and argues that there are “undeniable” (p. 13) though difficult to specify (p. 12) continuities between America's history of racial violence, especially lynching, and its contemporary capital punishment practices. Garland's account both borrows and distinguishes itself from other accounts of “American exceptionalism” with regard to capital and criminal punishment practices, ultimately crafting an insightful portrait of contemporary American culture and law by tracing the contours of a single institution.

Much is at stake in Garland's account and its relationship to those of other scholars — more, at least, than the usual struggle for preeminence in the ivory tower. In a section called “Against Conventional Wisdom” (p. 17), Garland takes a stand in opposition to those who use simplistic dichotomies to explain America's divergence from its peers with regard to capital punishment: “‘Americans’ are punitive and ‘Europeans’ are not. Americans are Puritan, or vigilante, or racist, or individualistic, and Europeans are not” (p. 20). In contrast, Garland

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<sup>3</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

<sup>4</sup> *Id.* at x.

emphasizes the commonalities in the long sweep of the history of capital punishment in the United States and Europe: American states were at the forefront of the abolition movement that began in earnest in the mid-nineteenth century, following a period on both sides of the Atlantic of contraction of the scope of capital punishment and the substitution of other modes of punishment, especially imprisonment. The United States diverged from Europe only recently, in the period since 1970, and Garland seeks the explanation for this late-stage slowing or stalling of the movement toward abolition in particular events and prevailing conditions of the past forty years. The clash between Garland's more contingent account of America's divergence and other more essentialist accounts is a battle with important ramifications both for future policy possibilities and for intellectual discourse.

On the policy side, Garland's persuasive emphasis on contingency with regard to America's recent divergence on capital punishment undermines the view, apparent in the media on both sides of the conflict over abolition, that the American death penalty is the product of some deep cultural divide between the United States and its contemporaries. At stake here is the malleability of the future of the American death penalty. If long-standing, powerful cultural forces are at play — akin to those posited by Michael Moore in his extreme but influential film *Bowling for Columbine*,<sup>5</sup> which portrayed a distinctive American culture of fear and violence — then America's death penalty and, by extension, the rest of its punitive criminal justice policies are the inevitable reflections of American character. To change such policies would thus require taking aim at deep features of that character. Conversely, if America's current death penalty practices are not the product of inexorable historical or cultural forces but rather the contingent and possibly ephemeral expression of history and culture as mediated by relatively recent events, then perhaps the same is true for America's other punitive criminal justice policies, given that they are the products of the same several decades. In this way, Garland's *Peculiar Institution* thesis reins in to some extent his own more sweeping analysis in *The Culture of Control*, which emphasized the central role of conditions of "late modernity" in explaining crime policy in the United States and Britain. *The Culture of Control* evoked concerns from critics that Garland was generalizing too much from the experiences of the United States and Britain and forecasting an inevitable and universal dystopian future.<sup>6</sup> *Peculiar Institution*, in contrast, balances the sweep of

<sup>5</sup> BOWLING FOR COLUMBINE (Iconolatri Productions Inc. 2002) (winner of the Academy Award for best documentary feature and many other awards).

<sup>6</sup> See NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 26 (2008) (questioning whether "a 'culture of control' . . . [is] an inevitable feature of 'late modernity'"); Lucia Zedner, *Dangers of Dystopias in*

its sociological history of American political and social structures with recurring focus on the events of the recent past.

Shifts in the relative explanatory powers of broad-brush sociological theories vis-à-vis recent, contingent events have consequences not just for the future malleability of criminal justice policies but also for the intellectual project of what Garland calls “sociological history” (p. 15). What does it mean to offer a “history of the present,” in Foucault’s terminology (p. 16)? How can we speak meaningfully about “causes” and “effects” of profoundly complex, often ambiguous, and ever-evolving social practices and discourses like those of criminal and capital punishment? How can the sociological historian offer an account that is comprehensive enough to have explanatory or predictive value without reifying the present and treating whatever is as what must be? Garland’s skepticism of overly deterministic accounts of the American death penalty offers an important window onto this tension and sounds a cautionary note for both producers and consumers of sociological history.

In what follows, I first situate Garland in the larger conversation about American penal exceptionalism and then underscore and extend his contribution regarding capital punishment and contingency. Part I surveys a variety of contrasting accounts of the divergence of America’s criminal and capital punishment policies from those of its peers and assesses Garland’s contributions to this broad conversation. Part II seeks to illustrate and deepen Garland’s account of the contingency of America’s recent death penalty story. This latter Part emphasizes the role of the Supreme Court in that story and argues that current American death penalty practices are even more deeply contingent than Garland recognizes: not only the fact of American retention but also the peculiarity of its form might have unfolded very differently. I develop this argument by imagining three counterfactual — and extremely divergent — American death penalty stories-that-might-have-been.

#### I. THE BLIND MEN AND THE ELEPHANT: GARLAND IN CONTEXT

The literature on American penal exceptionalism is broad and multidisciplinary — far too extensive and wide ranging to explore comprehensively here. Nonetheless, a brief survey of the different emphases offered by contrasting accounts is helpful in highlighting the nature and power of Garland’s intervention. This Part ultimately concludes that Garland’s most significant contribution is his recognition of

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*Penal Theory*, 22 O.J.L.S. 341, 353 (2002) (questioning “whether the Anglo-American response to the problem of crime is the only or indeed the dominant response of late modernity”).

both the importance and the contingency of the events of the last few decades of the twentieth century in the story of America's divergence from its peers on the issue of capital punishment, though he overstates the distinctiveness of his approach from those of some others.

*A. Contrasting Accounts of American Penal Exceptionalism*

Although there are many more that could plausibly be included, the following five works illustrate the wide range of explanatory accounts that have characterized the debate about the divergence of the United States in criminal and capital justice policies. As in the parable of the blind men describing an elephant based on their examination of a single part (the trunk, the ear, the tail, and so forth), each scholar sees a different creature depending on the nature of the chosen focal point.

1. *James Whitman*. — In *Harsh Justice*,<sup>7</sup> Professor James Whitman offers a primarily historical and cultural account of the divergence of American punishment practices that reaches back to the mid-eighteenth century. In the early modern era in Europe, Whitman argues, high-status and low-status offenders were treated differentially with regard to punishment, with milder and more dignified punishments (such as relatively privileged confinement and beheading) reserved for aristocrats and the like, and harsher and more degrading punishments (such as forced labor, mutilation, and hanging) inflicted on the common rabble.<sup>8</sup> In the modern era of liberalization and democratization, continental European countries such as France and Germany extended the use of dignified punishments to all, “leveling up” the nature and norms of acceptable punishment practices.<sup>9</sup> In contrast, in the United States, egalitarianism involved eliminating all forms of high-status treatment and thus resulted in a “leveling down” of the nature and norms of punishment practices, leading to a generalized use of harsh sanctions and an embrace of degradation as an acceptable or even essential element of punishment.<sup>10</sup> Whitman thus traces the current divide in punishment practices — from incarceration rates, to the treatment of juveniles, to the scope of criminalization, to the conditions of confinement in jails and prisons<sup>11</sup> — to differential norms of status equality.

The bulk of Whitman's exposition is devoted to developing his “dignity versus degradation” thesis, but he supplements this account with an argument about the power of the state in Europe as compared

<sup>7</sup> WHITMAN, *supra* note 2.

<sup>8</sup> *See id.* at 9.

<sup>9</sup> *See id.* at 10.

<sup>10</sup> *See id.* at 42–43.

<sup>11</sup> *See id.* at 3.

with that in the United States: “Traditions of social hierarchy are thus a large part of what makes France and Germany different, in their punishment practices, from the United States. The power and autonomy of the French and German states are another part.”<sup>12</sup> By “power and autonomy,” Whitman means to describe the ways in which Continental polities are characterized both by greater deference to state sovereignty and by greater insulation of state apparatuses and bureaucracies from democratic pressures. The United States, by contrast, is less autonomous and thus “is more given over to democratic politics — which is often to say demagogic politics.”<sup>13</sup> It also provokes more anti-statist suspicion when it regulates forbidden conduct. Thus, Whitman concludes: “A relatively weak state, like the American one, is much more prey to a harsh retributive politics than these [French and German] continental states are, and less able to forbid acts without branding them as evil.”<sup>14</sup>

2. *Franklin Zimring.* — In *The Contradictions of American Capital Punishment*,<sup>15</sup> Professor Franklin Zimring confines his analysis to the divergence between Europe and the United States on the use of capital punishment in particular, rather than on harshness in criminal punishment more generally as Whitman does. But like Whitman, Zimring is convinced that the answer to America’s recent divergence is rooted in the past — in particular, in the distinctive culture of vigilante justice that prevailed in some parts of the United States more than a century ago. Looking specifically at execution rates (rather than formal retention of the death penalty or even death sentencing rates), Zimring demonstrates “the close link between a history of vigilante conduct early in the twentieth century and the propensity to conduct executions in the 1980s and 1990s.”<sup>16</sup> Using lynching as the most “extreme example of vigilante values,” Zimring observes the connection between “excessive communal force at the dawn of the twentieth century and the propensity to execution a century later.”<sup>17</sup>

Zimring explains this connection by noting “[t]he radical degovernmentalization of the death penalty”<sup>18</sup> in the United States — the “symbolic transformation”<sup>19</sup> of capital punishment from a sovereign act to one done to vindicate the suffering of victims and reaffirm their social status. “We now tell ourselves that an executing government is acting

<sup>12</sup> *Id.* at 199.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 201.

<sup>15</sup> FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

<sup>16</sup> *Id.* at 66.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 52.

<sup>19</sup> *Id.* at 55.

in the interest of victims and communities rather than in a display of governmental power and dominance.”<sup>20</sup> Thus, contemporary executions, in their symbolic harkening to private violence, echo the enactment of vigilante violence in earlier eras — at least in American communities with deeply ingrained histories of such practices. In contrast to this American reinvention of the meaning of capital punishment, Zimring describes the European contemporary turn toward seeing capital punishment as an issue about the proper limits of state power and international human rights.<sup>21</sup> In Zimring’s view, the deep divergence between these two diametrically opposed discourses explains the divide in practices across the Atlantic.

Zimring also uses the link to vigilante values to explain patterns of executions within the United States. In the same decades in which the United States and Europe diverged on the death penalty, executions became more geographically concentrated within the United States, with a larger percentage of executions taking place in a smaller number of states — and with those states concentrated in the southern and southwestern United States.<sup>22</sup> Thus, Zimring concludes, earlier patterns of vigilante violence explain not only America’s divergence from Europe but also much of the divergence among jurisdictions within the United States: “[T]he particular origins of the very different execution policies among American states are not to be found in current events or recent history, but rather in differences between states that are at least half a century old.”<sup>23</sup>

Finally, as Zimring’s book title suggests, he emphasizes the “contradictions” between the continued embrace of executions within the United States and the traditional American fear of government and respect for due process. These contradictions, in Zimring’s view, explain why executions in the United States “generate ambivalence and conflict”<sup>24</sup> — with the consequence that “the debate about executions will remain more important in America than it was or will be in other nations.”<sup>25</sup>

3. *Michael Tonry.* — In *Explanations of American Punishment Policies*,<sup>26</sup> Professor Michael Tonry joins both Whitman and Zimring in looking to the past to explain America’s recent divergence from Europe in punishment practices. Tonry begins by citing his own earlier work, which found that “[m]oderate penal policies and low imprison-

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<sup>20</sup> *Id.* at ix.

<sup>21</sup> *See id.* at 40.

<sup>22</sup> *See id.* at 77.

<sup>23</sup> *Id.* at 85.

<sup>24</sup> *Id.* at x.

<sup>25</sup> *Id.* at 126.

<sup>26</sup> Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC’Y 377 (2009).



ment rates are associated with low levels of income inequality, high levels of trust and legitimacy, strong welfare states, professionalized as opposed to politicized criminal justice systems and consensual rather than conflictual political cultures.”<sup>27</sup> Tonry then seeks to understand why the United States falls at the “wrong end” of each of these metrics.<sup>28</sup> He theorizes that the answer lies in American “cultural and political values” — in particular, in four factors that Tonry calls “the paranoid strain, Protestant fundamentalism, governmental structure and patterns of racial hierarchy.”<sup>29</sup>

By “paranoid strain,” Tonry means to describe a style of American politics in which “[w]hat is deeply disapproved is seen as evil or immoral and few means are off limits in pursuit of its eradication.”<sup>30</sup> Tonry connects “Protestant fundamentalism” to intolerance and xenophobia and gives historical examples of Protestant fundamentalist support for the activities of the Ku Klux Klan, McCarthyism, and moralistic crusades against drugs and crime.<sup>31</sup> The “governmental structures” Tonry sees as most implicated in crime policy are the federalism commanded by the Constitution, the widespread state practices of electing prosecutors and judges, and winner-take-all electoral systems, which result in the “[p]oliticization of criminal justice policy.”<sup>32</sup> Finally, Tonry notes the persistent racially disparate impact of criminal justice policies in the United States;<sup>33</sup> he concludes that a long-standing pattern of racial insensitivity has rendered the human costs of America’s extraordinarily severe crime control policies “both tolerable and ignorable.”<sup>34</sup>

Not content with his own quartet of theories, Tonry urges himself and others to dig deeper: “Why have the paranoid strain and moralistic Protestant intolerance recurred . . . and why has the influence of tortured race relations remained so powerful?”<sup>35</sup> To Tonry, the answers likely lie even further back in history: “Big ideas about American history, including the Puritanism and intolerance of the first settlers, ideals of individualism and libertarianism associated with the frontier and the early slavery-based southern economy, no doubt need to be

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<sup>27</sup> *Id.* at 381 (citing Michael Tonry, *Determinants of Penal Policies*, in *CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE 1* (Michael Tonry ed., 2007)).

<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 390.

<sup>30</sup> *Id.* at 381 (citing RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS* (1965)).

<sup>31</sup> *See id.* at 382–83.

<sup>32</sup> *Id.* at 384; *see id.* at 384–86.

<sup>33</sup> *See id.* at 386–89.

<sup>34</sup> *Id.* at 389.

<sup>35</sup> *Id.* at 390.

woven into the answers.”<sup>36</sup> Tonry argues that “[r]esearch agendas in coming years should focus on this level of explanation.”<sup>37</sup>

4. *Nicola Lacey*. — In *The Prisoners’ Dilemma*,<sup>38</sup> Professor Nicola Lacey adds a different dimension to the various historical and cultural accounts canvassed thus far. Her account emphasizes the importance of differences in prevailing structures of political economy, as well as associated differences in political systems, in explaining punishment policy differences in contemporary democracies. Lacey contrasts two polar modes of political economy in contemporary democratic states. On the one hand, the “co-ordinated market economy”<sup>39</sup> (CME) depends on “long-term relationships and stable structures of investment,” including investment in education and job training, and “incorporates a wide range of social groups and institutions into a highly co-ordinated governmental structure.”<sup>40</sup> On the other hand, the “liberal market economy”<sup>41</sup> (LME) is “more individualistic in structure,” “less interventionist in regulatory stance,” and much less dependent “on the sorts of co-ordinating institutions which are needed to sustain long-term economic and social relations.”<sup>42</sup> Lacey argues that because CMEs benefit more from the reintegration of offenders into society and the economy, they are “structurally less likely to opt for degradation or exclusionary stigmatisation in punishment.”<sup>43</sup> Conversely, LMEs are more likely to produce surplus unskilled labor, and thus “the costs of a harsh, exclusionary criminal justice system are less than they would be in a co-ordinated market economy.”<sup>44</sup>

These two types of economies, Lacey notes, are associated empirically with different political systems as well. CMEs are associated with systems of proportional representation, while LMEs tend to have first-past-the-post, winner-take-all electoral systems.<sup>45</sup> Like Whitman and Tonry, Lacey sees criminal justice policymaking as more insulated from populist influences in systems of proportional representation than in winner-take-all systems.<sup>46</sup> Lacey deepens this widely shared perception by showing how the pursuit of “floating, median voters”<sup>47</sup> in win-

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> LACEY, *supra* note 6.

<sup>39</sup> *Id.* at 58 (quoting Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 1, 8 (Peter A. Hall & David Soskice eds., 2001)) (internal quotation marks omitted).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting Hall & Soskice, *supra* note 39, at 8) (internal quotation marks omitted).

<sup>42</sup> *Id.* at 59.

<sup>43</sup> *Id.* at 58.

<sup>44</sup> *Id.* at 59.

<sup>45</sup> *Id.* at 64.

<sup>46</sup> *See id.* at 64–66.

<sup>47</sup> *Id.* at 69.

ner-take-all systems allows for single-issue campaigns when there is a single issue — like crime over the past several decades — that has wide appeal to such voters.<sup>48</sup> Such single issues become even more powerful, Lacey observes, when a winner-take-all electoral system is paired with weak party discipline and decentralized political authority, as is the case in the United States.<sup>49</sup>

Lacey also notes a second political difference that is associated empirically with the two types of economies: the degree of deference accorded to the expertise of the professional bureaucracy.<sup>50</sup> In CMEs, the relevant bureaucrats in the criminal justice system — policy advisers, prison officials, prosecutors, and judges — tend to be long-term, career civil servants whose social status is high, whose expertise is respected, and who operate within a more insulated and less politically polarized environment.<sup>51</sup> In contrast, the same officials in LMEs more often face either direct electoral accountability or strong pressure to defer to the political needs of the elected leaders whom they serve.<sup>52</sup> Like Whitman, Lacey connects the independence of mediating bureaucratic institutions with the likelihood of milder penal policies. As Lacey crisply observes, “[o]nce a professional bureaucracy is undermined, one of the main tools for depoliticising criminal justice is removed.”<sup>53</sup>

5. *William Stuntz.* — In *The Collapse of American Criminal Justice*,<sup>54</sup> Professor William Stuntz privileges yet a different dimension of American distinctiveness to explain America’s turn toward penal harshness — the powerful backlash that countered the constitutional law and criminal justice policies of the 1960s. This account places both law and the incentives of legal and political actors at center stage. According to Stuntz, the punitive turn that began in the 1970s was a response to the combination of excessively lenient punishment policies and rising crime rates during the 1960s, along with an attempt by institutional actors to counteract the new procedural rights that the Warren Court’s criminal procedure revolution granted to criminal defendants.<sup>55</sup> This backlash took the form of a “partisan bidding war”<sup>56</sup> in the political arena for tough-on-crime policies. In Stuntz’s view, however, further analysis is required to understand the precise dynamics by which this backlash — which might otherwise have been merely a

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<sup>48</sup> See *id.* at 68–70.

<sup>49</sup> See *id.* at 70.

<sup>50</sup> See *id.* at 72.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 72–74.

<sup>53</sup> *Id.* at 74.

<sup>54</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>55</sup> See *id.* at 252–53.

<sup>56</sup> *Id.* at 253.

natural corrective to the 1960s pendulum swing toward leniency — became a punitive “turn toward extremism and excess.”<sup>57</sup>

Stuntz identifies four additional factors that pushed the backlash toward extremes. He begins by noting that “the punitive turn was so punitive because it was so long-lasting — and it lasted so long in large part because the crime wave that prompted it lasted even longer.”<sup>58</sup> To the duration of the crime wave, Stuntz adds three further considerations that all have to do with the incentives of official actors within the criminal justice system. First, “the allocation of budget authority” (by which state and federal governments pay for prisons and local governments pay for police) creates political incentives for local officials to rely more heavily on locking people up than on preventive policing in response to rising crime rates.<sup>59</sup> Second, the triumph of plea bargaining as a legal institution made prosecutions cheaper per unit; it “increase[d] dramatically the ratio of convicted felons to prosecutors and defense lawyers.”<sup>60</sup> Finally, the “substantive criminal law changed in ways that likewise encouraged more guilty pleas and fewer jury trials”<sup>61</sup> — because legislatures enhanced prosecutorial bargaining power in order to offset the costs of the new procedural rights that the Warren Court granted to defendants.<sup>62</sup> Like Lacey, Stuntz offers an explanation for America’s punitive penal policies that focuses less on history and culture and more on the incentives produced by institutional arrangements. Unlike Lacey, however, Stuntz concentrates primarily on legal rather than economic institutions, analyzing the effects of legal rules and allocations of legal power on the incentives of official actors.

### B. *Situating Garland Within the Exceptionalism Debate*

Garland’s focus in *Peculiar Institution* on the death penalty in particular, rather than on punishment policy more generally, leads him to address, quite profitably, some issues orthogonal to the main thrust of the penal exceptionalism debate. Like Zimring, who also focuses on the death penalty, Garland is struck by the conflict and ambivalence that surround capital punishment in the United States, despite its continued use. This conflict is reflected by the rarity of executions in the thirty-four states that retain the death penalty, where the most common cause of death on death row is “natural causes” (p. 11). Moreover,

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See generally William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006) (elaborating the connection between legislative incentives to overcriminalize and the Warren Court’s constitutional criminal procedure rulings).

even when convicted murderers are executed, it is only “after a very long process of legal contestation and uncertainty” (p. 11). “The overall picture,” Garland observes, “looks less like the simple ‘retention’ of capital punishment and more like an extreme form of institutional ambivalence, expressed in a uniquely cumbersome and conflicted set of arrangements” (p. 11). These arrangements render it exceedingly unlikely that the death penalty, imposed so rarely and after such long delays, could measurably contribute to its stated goals of retribution and deterrence. Thus, Garland questions whether capital punishment could plausibly serve additional functions beyond “the classic criminal justice purposes” in contemporary American society (p. 286).

It is in answering this question, in a chapter titled *Death and Its Uses* (pp. 285–307), that Garland offers some of his most psychologically insightful and eloquent observations. He explains how the current practice of capital punishment in America “meets needs, provides benefits, and generates value for specific groups and actors” (p. 287). One such group is criminal justice professionals: for police officers, prison guards, prosecutors, and even defense attorneys, “capital punishment is a practical instrument that allows them to harness the power of death in the pursuit of professional objectives” (p. 288). Of course, Garland recognizes that “[t]he most prominent ‘users’ of capital punishment in recent decades have been actors on the political stage” (p. 291). Elected officials of all stripes not only have relied on the powerful political shorthand of the death penalty but also have used the death penalty as “a token of political exchange” by which capital penalties allocate “enhanced status to selected constituents” and operate as “a political commodity . . . in the process of political bargaining” (pp. 291–93). Outside the political realm, the mass media, too, use the death penalty, relying on “the entertainment value of a death threat” to spice up reporting even of cases with only the most distant likelihood of capital charges (p. 294). Noting that “[t]he mass media deal in feeling, in sensation, in heightened emotion,” Garland observes that “trials where defendants face the prospect of death are perfect for media purposes” (p. 295). Garland is at his most poetic when he delves into the reasons that consumers of the media — all of us — are so compelled by the prospect of the death penalty, noting that it is precisely because the “death penalty proceeds amid normative anxiety and in violation of cultural taboos” that “it remains full of narrative potential” (p. 295). The pleasure of transgressing the taboos surrounding violence and death offers “a kind of liberation, a release from repression” (p. 304), and a “lascivious enjoyment” that create “a whole pornography of pain and death” (p. 300). Garland’s subtle compendium of “the promise, the power, and the pleasure of death” (p. 312) convincingly and evocatively describes the often subterranean functions of capital punishment in contemporary American society.

On the question more central to the penal exceptionalism debate — how the United States came to retain the death penalty in the first place — Garland is also a source of new insights and emphases. Garland builds on Whitman's secondary thesis about the "power and autonomy" of European states in comparison to the United States to show how the relative weakness of the American state has led to the devolution of authority over capital punishment to local political communities. American constitutional federalism, as emphasized by Tonry, is a substantial part of the story, but Garland contends that "[t]he relative weakness of the American nation state was economic and logistical as well as political" (p. 155). America's original "peculiar institution" of slavery limited the federal government's powers to tax and to monopolize the legitimate use of force, because slave states' resistance to federal power led to less regulated markets and less centralized law enforcement. Garland's "weak state" thesis thus may explain and buttress Lacey's emphasis on the features associated with liberal market economies. Moreover, at several points in American history, waves of political reform created constraints on state power such as "referenda, voter ballot initiatives, term limits, and open primaries in order to strengthen the power of the popular vote and to further limit the power of government incumbents" (p. 157). Like both Whitman and Lacey, Garland notes the weakness of mediating institutions like political parties and powerful bureaucratic elites in the United States. This weakness further contributes to the power of populist forces in policymaking, resulting in what Garland terms a "hyperdemocracy" (p. 164).

In Garland's account, this vacuum of state power at the center helped to create and continues to reinforce a powerful localism and populism in the United States. These institutional and political features also undergird and interact with other features of American "society and culture" (p. 166) that Garland argues are centrally implicated in America's death penalty story. The cultural features emphasized by Garland echo many of Tonry's themes: the lack of social solidarity and conflict among social groups, particularly along the lines of race; high levels of interpersonal violence, especially in the South; and distinctively American "cultural commitments" (p. 166), including not only populism and localism but also antistatism, individualism, religiosity, and the conflicting pulls of "ruggedness and refinement" (p. 175).

Against this institutional and cultural backdrop, Garland engagingly tells the story of the Supreme Court's temporary abolition of capital punishment in 1972 in *Furman v. Georgia*<sup>63</sup> and the powerful backlash that it engendered, particularly in the South (pp. 206–55). When the

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<sup>63</sup> 408 U.S. 238 (1972).

Court changed course and upheld a new generation of capital statutes four years later in *Gregg v. Georgia*,<sup>64</sup> the institution of capital punishment was “reinvented” in the United States, with the Court playing a “civilizing” role in limiting the scope of the death penalty (to a narrow set of offenses and to offenders with unimpaired culpability), while also “democratizing” the practice by returning the issue to local political actors and decisionmakers (pp. 268–80). Garland recounts how, in this post-reinstatement era, the death penalty “became a kind of masthead symbol for a new culture of control with its harsh sentencing laws, its mass imprisonment, and its risk-averse retributivism,” functioning as a “litmus test for law and order commitment” (p. 244). Here, Garland’s account dovetails with Stuntz’s description of a criminal justice backlash to the 1960s that led to a partisan bidding war for tough-on-crime policies. Naturally, the death penalty then took on quite different characteristics regionally within the United States, with the vast majority of executions taking place in southern and southwestern states, where the death penalty’s salience as an issue of “states’ rights” and its symbolic place in America’s “culture wars” fueled its popularity (pp. 248–49). Like Zimring, Garland also emphasizes “the underlying continuities and connections” between the South’s history of lynchings and the administration of contemporary capital punishment, including the geographical and racial patterns of its imposition, the community passions aroused by executions, and the death penalty’s continuing function as a means by which “groups of people express their autonomy, invoke their traditional values, and assert their local identity” (pp. 34–35).

Garland’s account of America’s recent death penalty history and current capital punishment practices is thoughtful and well observed; it evokes the same sort of flash of recognition that one experiences viewing the work of a skilled portraitist who “captures” a subject on canvas. One of the most substantial contributions of Garland’s account is its emphasis on the contingency of the American death penalty story, on its unpredictable (rather than foreordained) unfolding as a complex interaction of institutional structures, cultural dispositions, and contingent historical events. Garland readily acknowledges that the story could have unfolded quite differently — that the United States might well have decisively (rather than temporarily) rejected capital punishment through constitutional litigation at the time of *Furman* (p. 207) and that the current retention of the death penalty might yet prove to be transient (p. 23). In Garland’s account, institutional and legal structures take center stage over some unitary notion of deep, deterministic “culture.” For Garland, culture is the ever-changing flow of meaning that is channeled through these structures

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<sup>64</sup> 428 U.S. 153 (1976).

rather than an unchanging social fact that can serve as a satisfactory explanation for the complex course of history. In an earlier review of Whitman's and Zimring's theses, Garland elaborated on the kind of cultural argument that he rejects, explaining that culture is not

a fixed predisposition, like a DNA strand present in each social cell, programming social behaviour whenever it is switched on. . . . Without institutionalized grounding, cultural meanings are ephemeral currents — associations, connotations and linked images that can be rapidly replaced by others. . . . Cultural determinism is no more convincing than determinisms of any other kind: in denying the role of agency and of contingency it ends up denying the very history that it tries to explain.<sup>65</sup>

Any resistance that I feel to Garland's extremely persuasive account of capital punishment in America is to the extent that his account undermines or undersells its own contingency thesis. First, Garland at least muddies and perhaps even undermines his argument for contingency by trying to incorporate into his account all of the "cultural commitments" (p. 166) that he sees as implicated in the American death penalty story, such as populism, antielitism, violence, and religiosity (pp. 166–82). Despite the nuance and insight of Garland's cultural observations, one cannot help feeling that he wants to have his cake and eat it, too — to reject a certain kind of cultural argument but also to embrace the role of culture in his own account. Garland's desire to include his own take on American culture leads him to distance himself from other cultural accounts in a way that is not entirely fair, setting them up as species of straw men. In *Peculiar Institution*, Garland does not identify the scholars whose work he challenges, referring instead to unnamed "commentators" (p. 20) or "conventional commentaries" (p. 309) that reify culture as a single, overarching force. We know from Garland's earlier review of Whitman's and Zimring's works that they are among those he criticizes for treating cultural dispositions as unchanging and deterministic premises. However, Whitman and Zimring have responded, reasonably enough, that they view neither culture as unchanging<sup>66</sup> nor historical outcomes as predetermined by cultural forces.<sup>67</sup> It would be fairer to criticize Whitman and

<sup>65</sup> David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y 347, 365 (2005).

<sup>66</sup> See James Q. Whitman, *Response to Garland*, 7 PUNISHMENT & SOC'Y 389, 395 (2005) (rebutting the charge that Whitman "believe[s] in a timeless concept of culture" and instead characterizing his account as "a story of cultural change").

<sup>67</sup> See Franklin E. Zimring, *Path Dependence, Culture and State-Level Execution Policy: A Reply to David Garland*, 7 PUNISHMENT & SOC'Y 377, 378 (2005) (rebutting the charge of determinism, noting that Zimring has "long argued that the US Supreme Court . . . could have ended the death penalty in 1976, and will probably do so pretty soon") (citation omitted). I must confess that I, too, was miffed that Garland lumped me with Whitman and Zimring as a cultural essentialist, see Garland, *supra* note 65, at 349, especially in light of the fact that I called America's retention of capital punishment "a historical accident," see Carol S. Steiker, *Capital Punish-*



Zimring (and Tonry, for that matter) for locating the primary explanations for America's divergence in criminal and capital punishment so far in the past, when the timing of the divergence is so much more recent. This disagreement about the relevant time frame represents an indisputable difference in emphasis between Garland's account and those of Whitman, Zimring, and Tonry.

But Garland undermines his emphasis on recent, contingent events by simultaneously developing his own account of American culture that is sometimes difficult to distinguish from those of Whitman, Zimring, and Tonry. Like Whitman, Garland emphasizes the weakness of the American state and populist distrust of political elites; like Zimring, Garland emphasizes America's legacy of slavery and racial violence, especially lynching; like Tonry, Garland emphasizes the role of American religiosity. Consequently, something akin to Garland's critique of essentialist cultural arguments could be leveled at his own reliance, despite his many caveats, on "the distinctive nature of [American] society and culture" in the unfolding of the death penalty story (p. 166). The more one weaves distinctive cultural dispositions into a story of distinctive institutions, the harder it is to disassociate oneself completely from cultural essentialism or to maintain a strong insistence on contingency. The more one understands, in a deep way, all of the contributions, including cultural ones, to the present, the harder it is to imagine that things could have happened any differently. Sociological history thus always struggles — and Garland's account is no exception — to find some middle ground between tautology (any present practice reflects other aspects of the present and the past) and determinism (the present is the single possible outcome of the past). Of course, it is not methodologically incoherent to insist both that historical events are contingent and that they are bounded or shaped by social forces. Garland tries to express this dualism many times, perhaps most clearly when he writes of the American death penalty's recent history: "[C]ontingency counts, context counts, history counts. No one fully controlled what happened . . . . Instead, the underlying conflicts and fault lines of American society structured patterns of action and helped shape the eventual outcomes" (pp. 254–55). But there is always some tension in embracing both "contingency" and "structure," and one wishes that Garland had done more to address this tension head-on. His argument would have been stronger had he elaborated on how his reconciliation between contingency and structure differs from those of Whitman, Zimring, Tonry, and others, rather than from the anony-

mous, unidimensional, and almost caricatured version of cultural essentialism that he invokes as a foil.

Garland's story of contingency is further undermined by his attempt to extend his theory of America's divergence from Europe to his account of divergences in death penalty practices among American states. Here, Garland's attraction to the broad sweep of sociological theory obscures a less tidy but probably truer story of even more radical contingency. Applying his "weak state" theory to individual American states, Garland posits that "low levels of state development" characterize retentionist states vis-à-vis abolitionist states (p. 196) and that cultural dispositions (such as "cultures of civility and humanism" and "communal solidarity") are likewise different in retentionist and abolitionist states (pp. 198–99). These conclusions are not necessarily false (although measurement of such cultural dispositions is a tricky business at best), but they obscure the extent to which states themselves may be the wrong level at which to consider the nature and persistence of capital punishment practices in the United States. There is extraordinary divergence of death penalty practices among localities within retentionist states, even among localities that look very similar.<sup>68</sup> It is possible that explanations for these divergences may ultimately map onto Garland's theories,<sup>69</sup> but it seems at least as likely that other factors are at play, including the idiosyncrasies of local district attorneys.<sup>70</sup> The radical localism that is the result of American institutional structures also means that no big, top-down theory is going to map perfectly onto the micro level.

Finally, Garland's contingency thesis is shakiest when he seeks to distinguish between the contingency of the "fact" of America's retention of the death penalty (which Garland freely acknowledges could have gone the other way at the time of *Furman*) and the "form" of America's retention in the decades since *Furman*, which Garland maintains "has a pattern that is far from accidental" and which reflects the distinctive facets of American institutional arrangements and cultural commitments that Garland observes so well (p. 152). Although

<sup>68</sup> See, e.g., Steiker, *supra* note 67, at 65 (comparing, inter alia, Dallas County (Dallas) and Harris County (Houston) in Texas, and Philadelphia County (Philadelphia) and Allegheny County (Pittsburgh) in Pennsylvania).

<sup>69</sup> See generally James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. (forthcoming 2011–2012) (combining statistical analysis and cultural speculation to argue that the counties that most frequently use the death penalty share characteristics of parochialism and libertarianism).

<sup>70</sup> Compare, for example, the death penalty practices of Harris County (Houston), Texas, under District Attorney Johnny Holmes, Jr., see Allan Turner, *Mr. Law & Order*, HOUSTON CHRON., July 25, 2007, at A11, to those of Dallas County, Texas, under its first African American District Attorney, Craig Watkins, see Jennifer Emily, *Dallas County District Attorney Shifts Stance on Death Penalty*, DALLAS MORNING NEWS, Aug. 27, 2010, at A1.

Garland is right that the contemporary form of the death penalty reflects the features of American society that he identifies, it is surely also true that those features of American society could have yielded quite different “forms” of death penalty practices had events played out only slightly differently. In particular, the nature and timing of the Supreme Court’s intervention in the country’s capital punishment drama played a crucial role in the contemporary form of the death penalty, a fact that is underappreciated in Garland’s account. Moreover, the Court’s intervention diverted the United States from the path of human rights discourse embraced in Europe — one that Garland surprisingly neglects as a foil to the American experience. Like Stuntz, who emphasizes the role of legal change and the Supreme Court in the 1960s as central to the story of punishment practices, I want to put the role of the Supreme Court and constitutional law more centrally in the picture, especially in the account of contingency. The best way to do this is to imagine, counterfactually but not implausibly, three roads not taken.

## II. SLIDING DOORS: THREE ALTERNATIVE CONSTITUTIONAL HISTORIES OF THE DEATH PENALTY IN AMERICA

The idea of contingency is one with great narrative power, which is why it often recurs in both fiction and film. Consider the success of novels like Michael Chabon’s *The Yiddish Policemen’s Union*,<sup>71</sup> which imagines a Jewish settlement in Alaska rather than a Jewish state in Palestine, or Philip Roth’s *The Plot Against America*,<sup>72</sup> which imagines what would have happened in the United States during World War II if Charles Lindbergh, who sympathized with the Nazi regime, had defeated FDR in the 1940 presidential election. In conjuring phantom histories, these novels make us see vividly how recognizable features of our institutions and culture could produce very different, even unrecognizable, outcomes. In this same vein, the film *Sliding Doors*<sup>73</sup> imagines two entirely different story lines whose divergence turns on whether or not a young woman manages to board a particular London underground train, emphasizing the potentially outsized consequences of chance events and timing. I want to adopt this conceit and play out three different contemporary American death penalty stories that vary from the “true” version and from each other based on the timing and nature of the Supreme Court’s intervention.

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<sup>71</sup> MICHAEL CHABON, *THE YIDDISH POLICEMEN’S UNION* (2007).

<sup>72</sup> PHILIP ROTH, *THE PLOT AGAINST AMERICA* (2004).

<sup>73</sup> *SLIDING DOORS* (Paramount Pictures 1998).

*A. Warren Court Abolition*

As Garland and Zimring both agree, it is entirely plausible that the Supreme Court's constitutional abolition of capital punishment could have been definitive rather than temporary, taking capital punishment permanently off the American agenda. By imagining how a definitive constitutional abolition might have happened and what its consequences would have been, we can see more clearly the contingency of both the fact and the nature of current American death penalty exceptionalism.

The Supreme Court first signaled its interest in the issue of capital punishment in 1963 in a dissent from denial of certiorari in *Rudolph v. Alabama*,<sup>74</sup> written by Justice Goldberg and joined by Justices Douglas and Brennan — just one vote short of the four needed to grant review. The dissenters urged the Court to consider the argument that the death penalty was constitutionally disproportionate to the crime of rape<sup>75</sup> — an argument that the Court would later accept.<sup>76</sup> In the 1960s the use of capital punishment was falling in the United States, as it was in most other Western democracies. Public support for the death penalty was falling as well; indeed, a 1966 Gallup poll showed for the first time that a greater number of respondents opposed the death penalty than supported it (forty-seven percent to forty-two percent).<sup>77</sup> In 1965, the British Parliament passed an act provisionally abolishing the death penalty for murder, which became permanent in 1969.<sup>78</sup> During this same decade, the U.S. Supreme Court was in the midst of a “revolution” in constitutional criminal procedure, in which the Court extended the Fourth Amendment's exclusionary rule,<sup>79</sup> the right to counsel in criminal cases,<sup>80</sup> and the right to trial by jury in criminal cases,<sup>81</sup> among other key rulings. If the Court had addressed the ultimate constitutionality of capital punishment in the mid-1960s, rather than deferring action until after President Nixon had appointed four new Justices to the Court, it is entirely conceivable that the Court could and would have acted definitively.

<sup>74</sup> 375 U.S. 889 (1963).

<sup>75</sup> See *id.* at 891 (Goldberg, J., dissenting from denial of certiorari).

<sup>76</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding capital punishment for the crime of raping an adult woman unconstitutional under the Eighth Amendment); see also *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (holding capital punishment for the crime of raping a child unconstitutional).

<sup>77</sup> See Robert M. Bohm, *American Death Penalty Opinion, 1936–1986: A Critical Examination of the Gallup Polls*, in *THE DEATH PENALTY IN AMERICA* 113, 116 tbl.8.1 (Robert M. Bohm ed., 1991).

<sup>78</sup> See BRIAN P. BLOCK & JOHN HOSTETTLER, *HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN* 249, 270 (1997).

<sup>79</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>80</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

<sup>81</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

Imagine that the Court took up the constitutionality of capital punishment sometime between 1963 and 1968, when Earl Warren was still Chief Justice and before Nixon was elected President — instead or ahead of its infamous 1966 *Miranda* decision limiting police interrogation practices.<sup>82</sup> Suppose further that the case challenging the death penalty's constitutionality came from one of the big death penalty states outside the South (such as New York, Pennsylvania, or California). And suppose that the issue was litigated not by the united forces of the civil rights community through the NAACP Legal Defense Fund, as *Furman* was, but by a more mainstream legal team less likely to inspire backlash in the South — a team led by someone like Albert E. Jenner, Jr., the nationally known lawyer who had served on the Warren Commission and who litigated the first key constitutional victory for death penalty opponents in *Witherspoon v. Illinois*<sup>83</sup> in 1968. Under these circumstances, the chances of a ruling against the death penalty would have been high — especially after Justice Marshall replaced Justice Clark on the Court in 1967. Although Chief Justice Warren was not eager to decide the constitutional issue in the mid-1960s (as demonstrated by his refraining from voting to grant review in *Rudolph*), he made his opposition to capital punishment clear, announcing upon his retirement that he found the death penalty “repulsive.”<sup>84</sup> And Justice Fortas, who replaced Justice Goldberg in 1965, clearly shared Justice Goldberg's abhorrence for the death penalty, penning a widely circulated argument against the practice less than a decade after he, along with Chief Justice Warren, left the Court in 1969.<sup>85</sup> Thus, a 1960s majority composed of Chief Justice Warren and Justices Douglas, Brennan, Fortas, and Marshall might well have voted against the death penalty on broad and decisive grounds,<sup>86</sup> and it is possible that Justice Stewart or Justice White, both of whom eventually voted with the *Furman* majority in 1972 to hold the death penalty unconstitutional, could have been persuaded to do so or to concur on narrower grounds at this earlier time.<sup>87</sup>

<sup>82</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

<sup>83</sup> 391 U.S. 510 (1968).

<sup>84</sup> STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 239 (2002) (internal quotation marks omitted).

<sup>85</sup> See Abe Fortas, *The Case Against Capital Punishment*, N.Y. TIMES MAGAZINE, Jan. 23, 1977, at 9.

<sup>86</sup> In fact, this is exactly the majority that the Legal Defense Fund lawyers who litigated *Furman* were counting on in the key pre-*Furman* case *Maxwell v. Bishop*, 398 U.S. 262 (1970), which was eventually decided on narrow grounds after Chief Justice Warren and Justice Fortas left the Court and the case was put over for reargument. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 199 (1973).

<sup>87</sup> Justices Black and Harlan were unlikely to join such an opinion — Justice Black because of his textualist approach to constitutional interpretation and Justice Harlan because of the views

An opinion more decisively rejecting the constitutionality of capital punishment is not difficult to imagine — or even to craft from the meandering threads of the five individual opinions of the *Furman* majority. The argument that won over Justices Stewart and White in *Furman* was the claim that capital punishment as then widely practiced in the United States — yielding only a few executions from the broad category of death-eligible offenders based on the unreviewable discretion of sentencing juries — could not measurably contribute to any legitimate goals of punishment.<sup>88</sup> The only solutions to this problem would be to drastically limit sentencing discretion or to ramp up the use of capital punishment. Instead of taking the post-*Furman* approach of requiring that capital sentencing discretion be guided, the Court could have concluded that such guidance was not possible (as Justice Harlan had argued in *McGautha v. California*<sup>89</sup>) and that an intolerable degree of arbitrariness and discrimination was unavoidable (as Justice Douglas argued in *Furman*<sup>90</sup>). The inevitably arbitrary imposition of such a severe penalty could be said to violate human dignity and thus be inconsistent with “the evolving standards of decency”<sup>91</sup> that guided the Court’s understanding of the Eighth Amendment (consistent with the thrust of Justices Brennan and Marshall’s conclusions in *Furman*). The point is that the concerns that led to the Court’s constitutional regulation of capital punishment could have yielded a decisive constitutional abolition.

Had such an opinion been issued in the mid-1960s, it undoubtedly would have produced a backlash, especially as the crime rate rose, just as *Miranda* did. But that backlash might not have been quite as strong as the one that greeted *Furman*, given the earlier timing. Moreover, the backlash might have been somewhat less extreme in the South if the cases at issue were not southern ones and the petitioners were not represented by the same civil rights organization that had previously litigated the desegregation cases. Furthermore, the rest of the country might have discounted or even derided any southern backlash against constitutional abolition that occurred in the mid-1960s because of its closer temporal link to the South’s ugly and violent resistance to the civil rights movement. More importantly, a decisive

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reflected in his later opinion for the Court rejecting a constitutional challenge in *McGautha v. California*, 402 U.S. 183 (1971). See *id.* at 185–86.

<sup>88</sup> See *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring in the judgment); *id.* at 313 (White, J., concurring in the judgment).

<sup>89</sup> 402 U.S. 183; see *id.* at 204 (“To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”).

<sup>90</sup> See *Furman*, 408 U.S. at 256–67 (Douglas, J., concurring in the judgment).

<sup>91</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

constitutional abolition that firmly concluded that the death penalty could not be made to comport with contemporary values would have rendered later attempts to reinstate capital punishment extremely difficult to mount. The much less clear and decisive *Furman* decision contained an obvious invitation to future legislation and therefore litigation — an invitation thirty-five states accepted in the four years between *Furman* and *Gregg* by drafting new death penalty statutes (p. 192). A more decisive, per se ruling would have contained no such invitation; rather, any state that passed a new capital statute would have had to run the gauntlet of state and lower federal courts sworn to apply the Supreme Court's rulings faithfully. Unlike the organized campaign of opposition that followed *Roe v. Wade*<sup>92</sup> (and continues to this day), a campaign to reinstate the death penalty would not have had recourse to any incremental means to chip away at abolition (such as limiting public funding or enacting waiting periods or parental notification requirements in the abortion context). It is thus entirely plausible that a decisive constitutional abolition could have “stuck.”

If the Warren Court had produced an enduring constitutional abolition of capital punishment in the 1960s, the United States would have been at the forefront of the wave of abolition that swept Europe from the 1970s to the 1990s, and the United States would have received (or at least assigned itself) credit for being a leader in this human rights revolution, a position that would have made backsliding more unattractive, just as it has in Europe.<sup>93</sup> This counterfactual scenario highlights the way the Supreme Court's actual acceptance of the American death penalty as consistent with the fundamental rights guaranteed by the Constitution has precluded American acceptance of a human rights frame for the issue of capital punishment. It is striking that even in successful abolitionist movements within the United States — like those that led to the recent legislative abolitions in New Jersey, New Mexico, and Illinois — arguments to the effect that capital punishment violates a fundamental human right (to life or dignity) are virtually absent.<sup>94</sup> This resistance in the United States to seeing capi-

<sup>92</sup> 410 U.S. 113 (1973).

<sup>93</sup> See generally WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (Cambridge Univ. Press 2d ed. 1997) (1993) (tracing the development of international human rights law and its role in the abolition of capital punishment).

<sup>94</sup> See, e.g., Symposium, *Legislation, Litigation, Reflection and Repeal: The Legislative Abolition of the Death Penalty in New Jersey*, 33 SETON HALL LEGIS. J. 1 (2008) (describing the abolitionist efforts leading to legislative repeal of the death penalty in New Jersey); Deborah Baker, *NM Governor Signs Death Penalty Repeal*, ASSOCIATED PRESS, Mar. 19, 2009, available at Factiva, Doc. No. APRS000020090319e53j0001d (reporting the Governor's statement that his concerns about flaws in the criminal justice system were the primary reasons for his signing the repeal bill into law in New Mexico); Leigh B. Bienen, *Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and a New Salience for Is-*

tal punishment as a human rights issue stems in part from the powerful and preemptive role that constitutional law plays in American rights discourse. Many have noted, often ruefully, the widespread tendency in American society and legal culture to venerate the Constitution in a way that assumes that everything that is good — and certainly any right that is fundamental to human flourishing — is contained within it.<sup>95</sup> Whereas Garland emphasizes the role of the Supreme Court in generating backlash regarding capital punishment, it is also worth excavating the legitimizing role of the Supreme Court's constitutional imprimatur on capital punishment.<sup>96</sup>

An enduring constitutional abolition obviously would have rendered moot any question of American exceptionalism with regard to the death penalty. But playing out the counterfactual not only illustrates the plausibility of this alternative scenario but also demonstrates that the mode of divergence that did occur was the product of the particular nature and timing of the Supreme Court's intervention.

### B. Constitutional Avoidance

The significance of the Supreme Court's intervention in the path of capital punishment in the United States becomes even more apparent if we imagine its complete (or near-complete) absence. At least as plausible as an enduring constitutional abolition is the possibility that the Supreme Court might simply have left the question in the hands of the political branches. The Court offered a powerful rationale for doing so when it rejected a due process challenge to capital punishment in 1971 in *McGautha*, maintaining that the discretionary American death penalty could not be improved by quixotic attempts to rationalize it.<sup>97</sup> Justices Stewart and White were both members of the *McGautha* majority, and if one or both of them had failed to be swayed by a similar attack on unguided discretion under the Eighth Amendment the following year, the *Furman* challenge would have been defeated. If so, the strong conviction of the Court's Nixon appointees that the question of capital punishment belonged to the states

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*sues of Cost*, 100 J. CRIM. L. & CRIMINOLOGY 1301 (2010) (describing the importance of cost considerations to abolition efforts in Illinois).

<sup>95</sup> See generally SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) (describing quasi-religious veneration of the Constitution and its effects on American legal culture); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (criticizing the faith of Warren Court defenders that all desirable individual liberties could be extrapolated from the Constitution).

<sup>96</sup> See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429–38 (1995) (discussing the legitimating function of the Supreme Court's death penalty jurisprudence).

<sup>97</sup> See *McGautha v. California*, 402 U.S. 183, 204 (1971) (asserting the impossibility of drafting capital statutes that could offer guidance to sentencing juries that would improve on their discretionary judgment).



(and to Congress in the federal system) would have been resoundingly vindicated. Perhaps the Court might have gone on to police the borders of capital punishment, eventually rejecting it for crimes less than murder or offenders with reduced culpability, such as juveniles. But if the Court not only had refused to temporarily abolish the death penalty but also had failed to develop the complex body of Eighth Amendment regulatory law that followed its constitutional reinstatement of the death penalty, the consequences for the path of capital punishment in America would have been profound.

First, the absence of Supreme Court intervention would have prevented the backlash, strongest in the South, that *Furman* unleashed and that Garland so engagingly recounts. Thus, it is highly unlikely that the death penalty would have become an issue of states' rights and at least somewhat less likely that it would have become the kind of masthead symbol for law-and-order politics or shibboleth in the culture wars that it became when it was so strongly linked with the liberal wing of the Supreme Court — the same Court that had imposed *Brown*, *Miranda*, and *Roe*. Quite apart from *Furman*'s symbolic significance, its absence would have practical consequences, because it would also entail the absence of the regulatory regime that grew up in the wake of *Gregg*'s reinstatement of the death penalty. In the absence of the development of an ongoing body of constitutional law supervising death penalty procedures, there would be far fewer opportunities for federal courts to intervene in the administration of the death penalty in southern states (or anywhere else). Controversies like whether the federal courts were obstructing too many California executions or not staying enough Texas executions would be nonexistent. There would also be less impetus for "reform" legislation proposing to streamline federal review, like the Antiterrorism and Effective Death Penalty Act of 1996,<sup>98</sup> which was passed in the wake of the Oklahoma City bombing attack. Consequently, in the most active and committed death penalty states, the death penalty would be less of an issue than it is today — less threatened by the meddling of distant elites like the federal courts and more unequivocally endorsed by the constitutional order as an issue properly in local hands.

Conversely, in a world without *Furman* or *Gregg*, conflict over the death penalty would be far more concentrated *outside* the South, in states where abolitionist activists, politicians, and judges were more prevalent. State supreme courts in such jurisdictions would undoubtedly need to rule on state constitutional challenges to capital punishment even more frequently than they did in the *Furman* and post-

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<sup>98</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

*Furman* eras (as in California, Massachusetts, and New York, for example).<sup>99</sup> Hence, whatever backlash came into play would be backlash against state actors, as with the constitutional amendment that followed the California Supreme Court's abolition of the death penalty just months before *Furman*.<sup>100</sup> Consequently, it is not obvious that the use of the death penalty in such a world would be as concentrated as it is today in the South. Prior to *Furman*, as Garland notes (p. 200), California, New York, Ohio, and Pennsylvania were all substantial executing states, and without the Supreme Court to demand substantive and procedural restrictions that states like these might accept while the South resisted, it is not clear that the concentration of executions would have happened the way it did in the wake of *Furman* and *Gregg*. Accordingly, the map of controversy regarding the death penalty — death penalty “hot spots,” if you will — would likely resemble the map of the current controversy over gay marriage, which has had focal points in states like Hawaii, Massachusetts, Iowa, and New York. No one expects much development of the same-sex marriage debate in Alabama or Oklahoma. Finally, in a world without constitutional regulation of capital punishment, death penalty practices would undoubtedly be harsher — more nasty, brutish, and short — because they would be less cabined by the substantive and procedural restrictions of twenty-five years of Eighth Amendment constraint. These qualities would likely have given a boost to abolitionist activities in “teetering states” and might have led a few more states to jump to the abolitionist camp than would have done so in a world with a kinder, gentler death penalty.

In short, the pattern or “form” of capital punishment in the world of a more hands-off Supreme Court would look very different — an entirely plausible world that was only a single vote away in 1972.

### C. Race-Based Abolition

Yet another world also lay a single vote away — a later constitutional abolition, rather than the earlier one imagined above. The Supreme Court's ruling in the 1987 case of *McCleskey v. Kemp*,<sup>101</sup> which rejected a challenge to the constitutionality of the death penalty based on its racially discriminatory pattern of imposition, was a 5–4 decision. Justice Powell, author of the majority opinion in *McCleskey*, repu-

<sup>99</sup> In California, see *People v. Anderson*, 493 P.2d 880 (Cal. 1972). In Massachusetts, see *Commonwealth v. O'Neal*, 327 N.E.2d 662 (Mass. 1975); *Commonwealth v. O'Neal*, 339 N.E.2d 676 (Mass. 1975); *Opinion of the Justices*, 364 N.E.2d 184 (Mass. 1977); *District Attorney v. Watson*, 411 N.E.2d 1274 (Mass. 1980); and *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984). In New York, see *People v. Lavelle*, 817 N.E.2d 341 (N.Y. 2004).

<sup>100</sup> See MELTSNER, *supra* note 86, at 306–07.

<sup>101</sup> 481 U.S. 279 (1987).

diated his vote only a few years later, when his biographer asked him upon his retirement if there were any votes that he would change, and he replied, “Yes, *McCleskey v. Kemp*.”<sup>102</sup> Had Justice Powell actually voted the other way, then the death penalty would have been constitutionally abolished in 1987 in a manner that would turn all of the race-based theorizing about America’s current capital punishment exceptionalism on its head.

An abolitionist opinion in *McCleskey* is not difficult to imagine (Justice Brennan’s dissent is the obvious place to start). The majority frankly noted its concern that “*McCleskey*’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system”<sup>103</sup> and thus might apply both to noncapital cases and to discrimination beyond that based on race — a concern that Justice Brennan called “a fear of too much justice.”<sup>104</sup> But it would have been easy enough for the Court to draw a sharp line at capital punishment — something it had been doing in its Eighth Amendment jurisprudence since *Furman*, solemnly intoning in a variety of contexts that “death is different.”<sup>105</sup> Moreover, it would have been just as possible to draw a sharp line around race as well, given the unique place of race in American history in general and in the history of capital punishment in particular — a history that Justice Brennan surveyed at length in his dissent.<sup>106</sup> Had the Court done so and held in favor of *McCleskey* based on his statistical case for the influence of race in Georgia’s capital sentencing process, the death of the death penalty would have inexorably followed. It would have been next to impossible for states to rebut statistical proof of racial disparities, which have been found not only in the South but in many other jurisdictions as well.<sup>107</sup> Furthermore, once the death penalty was constitutionally suspended on racial grounds in a particular jurisdiction, it would be extraordinarily difficult and expensive, not to mention racially fraught, for such a jurisdiction to try to line up a cohort on death row large enough and representative enough to mount a reinstatement challenge.

<sup>102</sup> David Von Drehle, *Retired Justice Changes Stand on Death Penalty*, WASH. POST, June 10, 1994, at A1 (quoting Justice Powell during a 1991 interview by John C. Jeffries Jr., Justice Powell’s official biographer) (internal quotation marks omitted).

<sup>103</sup> *McCleskey*, 481 U.S. at 314–15.

<sup>104</sup> *Id.* at 339 (Brennan, J., dissenting).

<sup>105</sup> See, e.g., *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (requiring “a correspondingly greater degree of scrutiny of the capital sentencing determination”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that “the penalty of death is qualitatively different from a sentence of imprisonment, however long”).

<sup>106</sup> See *McCleskey*, 481 U.S. at 328–35 (Brennan, J., dissenting).

<sup>107</sup> See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1654–62 (1998).

Had racial disparities served as the impetus for American abolition of the death penalty in 1987, the “story” of the American death penalty would have been a radical inversion of the race-based theories that now proliferate to explain both the “fact” and the “form” of America’s retention of capital punishment. From Zimring to Tonry to Garland, the importance of race and of the South’s history of lynching are central to understanding how the United States came to be where it is today with regard to the death penalty. Yet this very same history could have served as the impetus not for the retention of capital punishment, nor for the distinctive pattern of its use in the old lynching states, but rather for a top-down, elite abolition of capital punishment as inconsistent with the fundamental American value of equality enshrined in the Equal Protection Clause of the Constitution. That shameful history of racial violence would even get pride of place in the Court’s opinion (as it did in Justice Brennan’s dissent) — written into the very text of abolition.

#### CONCLUSION: CAPITAL PUNISHMENT AND CONTINGENCY

Each of the counterfactual histories in Part II demonstrates, contrary to the implication of Garland’s account, that the cultural commitments that Garland identifies as shaping the current form of American death penalty practices have no necessary valence; they might as easily have shaped an opposite outcome. In section II.A (Warren Court abolition), American constitutionalism could have fed into the emergence of a human rights norm against executions rather than set its face against such a norm. In section II.B (constitutional avoidance), American localism could have enabled the country to have a death penalty markedly less regulated and differently distributed geographically. In section II.C (race-based abolition), the racial history of the American death penalty could have been the force driving its abolition rather than its retention. Moreover, all three counterfactuals suggest that the Supreme Court and its contingent decisions play an important role in shaping cultural commitments, again in contrast to Garland’s account, which offers parallel and distinct (rather than intertwined) accounts of legal decisionmaking and cultural commitments.

The “sliding doors” exercise thus both illustrates and underscores Garland’s contingency thesis and shows how it extends perhaps even further than Garland himself might take it — deeply into the “form” as well as the “fact” of American retention. Chance events in Supreme Court litigation — the precise timing of a grant of review, the shift of a single vote — could have radically altered not only America’s course of abolition or retention but also, quite profoundly, the shape of death penalty practices whose current form Garland traces so convincingly to their institutional and cultural roots. Garland’s conclusion that “[t]he death penalty’s new [post-*Furman*] meanings were grounded in the raw materials of preexisting conflicts and shaped by the structur-

ing presence of an institutional landscape” (p. 255) is powerful and persuasive, but we still need to be reminded — by chefs and gardeners, perhaps? — just how differently the same “raw materials” and “landscapes” can be rendered. Only by unsettling the past can we keep in mind how unsettled the future is. Sociological history at its best — and Garland’s is an excellent example — can be regarded only as a mirror, not as a crystal ball.